T.U. Electric *and* International Brotherhood of Electrical Workers, Local 2337. Case 16–CA–14381

March 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 30, 1991, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, T.U. Electric, Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On November 7, 1991, the Respondent filed a motion to reopen the Record to submit evidence that the Union, by letter to the Respondent dated January 10, 1991, withdrew its grievance concerning employee Calvin Jackson's discharge. On November 29, 1991, the General Counsel filed an opposition to the Respondent's motion, and on December 18, 1991, the Respondent filed a reply to the General Counsel's opposition.

We deny the Respondent's motion as untimely in light of the Respondent's receipt of the Union's letter 9 months before the judge issued his decision and 10 months before its motion to the Board. We shall, however, leave to the compliance stage of this proceeding a determination of whether the Union effectively withdrew its grievance concerning Jackson's discharge and the effect of such withdrawal on the affirmative relief provisions of our Order.

Elizabeth J. Kilpatrick, Esq., for the General Counsel.
David C. Lonergan and *Kimberly A. Nickolay, Esqs. (Worsham, Forsythe, Sampels & Woolridge)*, of Dallas, Texas, for the Respondent.
Yona Rozen, Esq. (Gillespie & Rozen, P.C.), of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Fort Worth, Texas, on August 9, 1990, and is based on a charge filed by International Brotherhood of Electrical Workers, Local 2337 (the Union) on January 9, 1990, alleging generally that T.U. Electric (Respondent)[1] committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On June 20, 1990, the Regional Director for Region 16 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1)[2] and (5)[3] of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing, and asserting certain affirmative defenses.[4]

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for Respondent, and my observation of the demeanor of the witnesses I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a Texas corporation, with an office and place of business in Dallas, Texas, and a facility in Tatum, Texas, where at all times material it has been engaged in the business of generating, transmitting, distributing, and selling electrical energy as a public utility; that during the 12-month period ending with the issuance of the complaint herein, in the course and conduct of its business operations, it purchased and received at its facility mentioned above products, goods, and materials valued in excess of $50,000 directly from points outside the State of Texas.

Accordingly, I find and conclude that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Also known as Texas Utilities Electric Company.

[2] Sec. 8(a)(1) of the Act provides that, ''It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:. . . .''

Sec. 7 of the Act provides that,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[3] Sec. 8(a)(5) of the Act provides that, ''It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). . . .''

[4] To the extent that the affirmative defenses place factual matters into controversy they are implicitly dealt with herein. To the extent that the it is alleged that the complaint fails to state a claim on which relief can be granted the affirmative defense is hereby overruled, and, accordingly, dismissed.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The complaint alleges that Respondent has failed and refused to bargain collectively in good faith by withholding information requested of it by the Union. The Union asserts that the information is necessary and relevant to the processing of grievances, while Respondent asserts that its refusal and failure, to the extent they have occurred, are privileged by its legitimate business interests.

B. *Background*

For over 16 years the Union and Respondent have been parties to successive collective-bargaining agreements, as the Union represents Respondent's employees at facilities located at Fairfield, Mt. Pleasant, Tatum, and Franklin, Texas. The most recent had a term of November 11, 1989, to November 10, 1990. The complaint alleges, the answer admits,[5] and I find that at all times material herein the following employees of Respondent constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All production and maintenance employees regularly engaged in employment at [Respondent's] plants in Fairfield, Mt. Pleasant, Tatum and Franklin, Texas, and job classifications and wage rates as outlined in Article XI of the collective bargaining agreement between the [Respondent] and [the Union], and any production or maintenance employees whose job classification might be established during the tenure of said agreement.
>
> Excluded: Office clerical employees, guards and supervisors within the meaning of the Act.

C. *The Facts in Issue*

The Union's steward and former assistant business manager, Bobby Pauler, who is also an employee of Respondent, testified that it is his duty as steward to process grievances, engage in contract negotiations with Respondent and, generally, serve as a conduit for communication between Respondent and the Union. He also stated that he filed a grievance concerning the discharge of an employee named Calvin Jackson on June 30, 1989, and that, on or about July 13, 1989, Respondent denied the grievance.

Thus, on July 19, 1989, the Union made a written request for information from Respondent concerning the discharge. On August 2, 1989, Respondent supplied the Union with a 27-page response.

On or about August 8, 1989, the Union made a further request for information, indicating that this second request was occasioned by the response to its first request. This request read, in pertinent part, as follows:

> The Union is requesting the following information, in response to information received from the previous request for information, dealing with Mr. Jackson's termination.
>
> 1) A copy of the Payroll Change Authorization form which was used to stop Mr. Jackson's pay because of his termination.
>
> 2) A copy of the documentation on the following discipline Mr. Jackson was to received (sic). Including but not necessarily limited to letters, memos, and supervisor's notes.

2–27–83	Step 1		
6–05–88	Step 1	Safety violation	Richard Gregory

> 3) A copy of the documentation on the following counselling sessions Mr. Jackson was to have received. Including but not necessarily limited to letters, memos, and supervisor's notes.

12–19–82	Counseled	Sleeping	Billy Conway
12–19–82	Counseled	Job Neglect	Billy Conway
12–19–82	Counseled	Job Neglect	Billy Conway
4–12–87	Counseled	Tardiness	Richard Gregory
7–26–87	Counseled	Tardiness	Richard Gregory
2–06–88	Counseled	Tardiness	Richard Gregory
4–11–88	Counseled	Tardiness	Richard Gregory
6–24–88	Counseled	Word Procedure	Dennis Tucker

> Please provide this information to the Union by August 15, 1989.

Pauler testified that the reason he asked for additional information was because of (a) the sheer number of incidents listed, (b) without documentation he thought was appropriate to determine the background of each incident, (c) the fact that there were three incidents on the same day, and (d) he felt it necessary to verify that the alleged counseling sessions had in fact been conducted. Amplifying, he testified that such information would help the Union to determine whether or not to continue to process the grievance, apparently, for instance, in deciding whether or not to take it to arbitration.

Pauler admitted that similar requests for information had been made by the Union in the past, and always similarly denied by Respondent. He stated that that the Union had taken no further action about the denials, except to take up the matter and discuss the denial at the next stage of the grievance procedure. I infer therefrom that, in at least some instances, the Union found whatever it subsequently received adequate for its purposes. He testified, however, that there were neither contractual nor verbal understandings between the Union and Respondent that the Union either agreed with or acquiesced in Respondent's position that such materials are privileged. He denied that the Union has ever orally or in writing waived its position that it was entitled to such information as is contained in the supervisor's notes.

Pauler admitted that he possibly could have gotten some of the information he sought by discussing it with the employee, the affected supervisor, or even with Bannerman; he also stated, however, that he would have no way of knowing

[5] As both were amended at trial.

if, in speaking to a supervisor, or Bannerman, he was being given the same information as that set forth in the supervisor's notes unless he also were permitted to see the supervisor's notes. Pauler noted that Respondent has never offered to provide the supervisors for interviews, and that Bannerman has never offered to provide the information in some alternative form.

On or about August 15, 1989, Respondent wrote to the Union, stating:

> In response to your request of August 8, 1989, enclosed you will find a copy of the final Payroll Change Authorization on Mr. Jackson. Documentation on Nos. 2 and 3 is privileged information and it is felt that the Union is not entitled to it.

It is undisputed that Respondent maintains a progressive disciplinary system. The system has four steps, not necessarily followed sequentially, starting with an oral reminder and concluding with discharge. Additionally, Respondent's supervisors have engaged in the practice of ''counseling'' employees, for matters of discipline short of the formal 4 steps.

Respondent's personnel supervisor, Bannerman, and Manager of Labor Relations Dick, however, admitted that supervisors are consulted, and a ''consensus'' is sought from an employee's present and past supervisors when considering whether or not to impose severe discipline, and whether or not extenuating or mitigating circumstances were present.

In this respect, Respondent's position is that supervisors are ''encouraged'' to make notes of incidents with those they supervise, such as oral disciplines and/or counseling sessions. As Dick testified, he tells supervisors that, unless they have photographic memories, he ''recommends'' that they take notes. This is evidently thought helpful to the supervisor's memory, for example in an employee's annual evaluation, as supervisors are rotated among employee groups of about 10 to 15 employees. Bannerman also admitted that such notes have sometimes been used in past arbitration hearings, despite his attempts to portray the practice as merely voluntary and private on the part of the individual supervisors; he was unable to recall the name of any supervisor who failed to keep such notes, however.

Notwithstanding its objections to producing the materials requested, at trial Respondent produced certain writings, pursuant to subpoena, following receipt of assurances from me that such materials would be held as a sealed exhibit. I offered such assurances in an attempt to enable Respondent to comply with the subpoena without, by doing so, waiving its position in this case that the materials sought are not producible.

Analysis and Conclusions

An employer's duty to bargain in good faith with the collective-bargaining representative of its employees includes the obligation to provide information needed by a bargaining representative for the proper performance of its duties. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal, Inc*., 224 NLRB 1505 (1976).

The legal standard concerning just what information must be produced is whether or not there is ''a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative.'' *Bohemia, Inc*., 272 NLRB 1128 (1984). The Board uses a liberal, discovery-type standard in determining whether information is relevant or potentially relevant. *NLRB v. Truitt*, supra.

Information about employees actually represented by a union is presumptively relevant and necessary and is required to be produced. *Ohio Power Co*., 216 NLRB 987 (1975), except in certain narrow instances where the information is deemed confidential; in such circumstances, the information need not be produced until safeguards are provided. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

The Board, in determining that information is producible, does not pass upon the merits of the grievance underlying a request such as was made in this case; and the Union is not required to demonstrate that the information sought is accurate, nonhearsay, or even ultimately reliable. *W. L. Molding Co*., 272 NLRB 1239 (1984).

I find that the Union's request in this case meets the standard set out above. In light of Respondent's response to the Union's first request for information regarding employee Jackson, the Union's second request seems quite reasonable, and well designed to lead to further information about Jackson's past history with Respondent. Such information has an obvious possibility of affecting the Union's decision about such matters as whether, and how, to further proceed with the grievance concerning Jackson's discharge.

Nor is the Union foreclosed from securing the desired information by any claim of waiver, or untimeliness, which may be put forward by Respondent.

First of all, the evidence is clear that no express waiver of the right to look at supervisory notes has ever occurred. Nor does the Union's failure to pursue such notes in the past amount to a ''clear and unmistakable'' waiver of statutory rights, an effect not lightly inferred.

Secondly, any claim of untimeliness is defeated by the fact that the Union has filed notice of its intent to pursue the grievance at the next higher level. The fact that the grievance has not yet been processed at that level is the product of Respondent's delay and refusal to supply the requested information, not of any delay attributable to the Union.

Respondent's attempt to equate the notes of its supervisors with ''witness statements'' and to argue that the authorities do not require the production of such materials is simply not logical, and the authorities cited by Respondent are inapposite. The Board has never ordered a party to litigation to turn over its ''work product,'' prepared in defense of litigation. But these ''supervisory notes'' were not prepared in preparation for litigation. They were clearly the product of the ''encouragement'' and ''recommendation'' of Respondent's officials to the supervisors. To me it seems clear that those officials were conveying to the supervisors that, if they didn't want to run the risk of getting into trouble on account of any lapse of memory which might cause Respondent any difficulty, they'd best keep notes. Thus, it would seem that only the most obtuse of supervisors would fail to keep notes of any unusual incident at work, which might conceivably require recitation one day.

Under such circumstances, I am not impressed by Respondent's claim that the notes are not producible because they are not its property, and are not in its custody or possession. Such claims seem altogether too convenient to Respondent to be allowed much credence. That the supervisory notes in question are subject to Respondent's control is clear from the fact that Respondent has only to direct its supervisors to bring them to work, or to turn them over to higher officials.

Finally, Respondent's argument that the Union's request is not valid because it fails to account for the ''alternative methods'' of talking to employees, supervisors, and/or managers is not a defense to this complaint. The ''alternatives'' mentioned by Respondent have the infirmity of forcing the Union to rely on the verbal recitations of persons whose memories may have faded, or who may have a reason to dissemble or fabricate. The fact of fading memories is proven by the very directions given by Respondent to its supervisors as to the reason why they were being ''encouraged'' or ''recommended'' to keep notes.

Accordingly, I find and conclude that the complaint's allegations have been proven in every respect and that Respondent's defenses to these allegations are without merit.

I conclude therefrom that Respondent has violated Section 8(a)(5) and (1) of the Act and shall order an appropriate remedy.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All production and maintenance employees regularly engaged in employment at (Respondent's) plants in Fairfield, Mt. Pleasant, Tatum and Franklin, Texas, and job classifications and wage rates as outlined in Article XI of the collective bargaining agreement between the (Respondent) and (the Union), and any production or maintenance employees whose job classification might be established during the tenure of said agreement.
>
> Excluded: Office clerical employees, guards and supervisors within the meaning of the Act.

4. By failing and refusing to provide the Union with the information requested in sections 2 and 3 of its letter of August 8, 1989, including any and all pertinent supervisory notes in its possession or or which are in the possession of its supervisors but which are subject to its control, Respondent has unlawfully refused, and is unlawfully refusing, to bargain collectively in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act.

5. The above unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Order will require Respondent to furnish the Union with the information which it has unlawfully failed and refused to furnish, and, if requested by the Union, to further process the grievance of employee Calvin Jackson.

On these findings of fact and conclusions of law and on the entire record,[6] I issue the following recommended

ORDER[7]

The Respondent, T.U. Electric, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local 2337 by refusing to provide the Union with information requested by the Union which is reasonably necessary or useful to the Union in representing employees of Respondent, including that requested by the Union in connection with the processing of the grievance of employee Calvin Jackson.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the above-named labor organization with the information requested in its letter of August 15, 1989, and, if the labor organization requests, further process the underlying grievance of employee Calvin Jackson.

(b) Post at its office in Dallas, Texas, and in its plant in Tatum, Texas, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] All outstanding motions inconsistent with the results of this decision, if any, are hereby overruled.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith with International Brotherhood of Electrical Workers, Local Union 2337 in the following unit which is appropriate for the purposes of collective bargaining:

Included: All production and maintenance employees regularly engaged in employment at T.U. Electric's plants in Fairfield, Mt. Pleasant, Tatum and Franklin, Texas, and job classifications and wage rates as outlined in Article XI of the collective bargaining agreement between the (Respondent) and (the Union), and any production or maintenance employees whose job classification might be established during the tenure of said agreement.

Excluded: Office clerical employees, guards and supervisors within the meaning of the Act.

WE WILL NOT fail or refuse to provide the above-named labor organization with information requested by it which is reasonably necessary or useful to it in representing employees in collective bargaining with us, and WE WILL, if requested by the labor organization named above, further process the grievance concerning the termination of employment of employee Calvin Jackson.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

T.U. ELECTRIC